

ESTTA Tracking number: **ESTTA157514**

Filing date: **08/17/2007**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	79015094
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Submission	Reply Brief
Attachments	Applicant's Reply Brief.pdf ( 7 pages )(271251 bytes )
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Date	08/17/2007

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re the Application of

RIGHT-ON CO., LTD.

Serial No.: 79/015,094

Filed: July 8, 2005

Mark: Design

Examining Attorney: Gina Fink

Law Office 109

Docket Nos.: 128687

Trademark Trial and Appeal Board  
Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

**APPLICANT'S REPLY BRIEF**

In connection with the above-referenced trademark application, and in response to the Examining Attorney's Appeal Brief, Applicant submits that the Examining Attorney's refusal to register the mark under Trademark Act §§1, 2 and 45, 15 U.S.C. §§1051, 1052 and 1127, should be reversed. The evidence of record shows that the mark in the present application is inherently distinctive. This can be seen from the mark's distinct appearance, from common market practices in the clothing industry, and from prior registrations existing on the U.S. Patent and Trademark Office database. As such, the refusal should be reversed and the application should be allowed to proceed to registration.

**I. The Distinct Appearance of the Mark Will Cause Consumers to View it as a Source Identifier**

A review of the mark in the present application shows that consumers will readily view the mark as a source identifying trademark. Contrary to the assertions of the Examining

Attorney, the shape of the mark in the present application is unique and arbitrary. The mark in the present application is not a common shape, but rather represents a unique design that would be easily identifiable by consumers as a source identifying trademark. Specifically, the mark represents six swooping intersecting arcs, presented in mirror image with three arcs appearing on each pocket, having the appearance of one large partially displayed center circle or archway, with two double lined partially displayed outer circles or archways, one on each side of the pockets. This distinct design is unique and arbitrary. As such, consumers will readily recognize this mark as a source identifier.

Applicant agrees that the four factors listed by the Examining Attorney are the proper criteria for determining whether a design is inherently distinctive: whether the design is a common basic shape or design; whether the design is unique or unusual in the field for the identified goods; whether the design is a mere refinement of a commonly adopted and well-known form of ornamentation for the particular class of goods; and if presented together with text or other matter, whether the design is capable of creating a commercial impression distinct from any accompanying matter (such as wording). *See, e.g., In re F.C.F. Inc.*, 30 USPQ2d 1825, 1827 (TTAB 1994); *In re Chung, Jeanne & Kim Co.*, 226 USPQ 938, 941 (TTAB 1985).

In analyzing Applicant's mark, it is clear that it is inherently distinctive. First, Applicant's mark is not a common shape or design; rather, the mark represents a distinct and unique stitching pattern, meant to distinguish Applicant's goods from those of other clothing manufacturers. The distinct six swooping arcs, giving the appearance of partially displayed circles or archways, is anything but common. In fact, this design is elaborate and unique, meant to catch the eye of consumers and distinguish Applicant's goods.

A review of the many pocket stitching designs of record shows that Applicant's mark is unique and very unusual in the field of the identified goods. Applicant's mark is not like any other pocket stitching design of record with respect to the appearance, shape and style of the mark.

Nor does the mark represent a mere refinement of a commonly adopted, well-known form of ornamentation. As the record demonstrates, the use of pocket stitching designs in the clothing industry is not a form of ornamentation, but is rather a common method of source identification. Clothing manufacturers commonly use pocket stitching designs to distinguish their goods from those of their competitors. As such, Applicant has not merely refined a common form of ornamentation, but rather, in crafting its mark, Applicant has held true to the common practices of its industry in presenting a source identifying pocket stitching design on its clothing.

Finally, Applicant's pocket stitching design is presented along with the clothing pockets themselves. When viewed in conjunction with the overall common pocket shape, Applicant's mark creates a unique commercial impression. The highly unique and arbitrary nature of Applicant's mark will, when viewed in connection with the pocket-shapes upon which the mark is located, give consumers a clear indication as to the source of the goods. Consumers will readily identify this design as a whole, recognizing it as an indicator that these goods are offered by Applicant.

**II. It is Common Market Practice to Use Pocket  
Stitching Designs as Source Identifiers**

The evidence of record shows that it is common market practice to use pocket stitching designs as trademarks. This common market practice is shown in the large number of trademarks that are currently displayed on pockets and used as source identifiers by the

consuming public. The record provides a large number of examples of clothing manufacturers using this very location to display their source identifying trademarks. The sheer number of clothing manufacturers using this location to display their trademarks shows that the consumer base is well conditioned to view pocket stitching designs as trademarks.

In sharp contrast, there is only minimal evidence in the record that pocket stitching designs are used for ornamentation. In fact, the weight of the evidence of record shows pocket stitching designs being used as source identifiers. For instance, the New York Times article excerpt provided by the Examining Attorney in her response to the Request for Reconsideration cites nearly 100 lawsuits that Levi's is currently pursuing to enforce its pocket stitching designs. This aggressive enforcement of Levi's designs shows that the company considers them important source identifiers. Further, the website screenshots from Wikipedia.com evidences the great diversity of pocket stitching designs currently being used in the marketplace as source identifiers by virtually all major jean manufacturers (<http://jeans/pbwiki.com/JeanPocketProject> (March 7, 2007)). In each case, the jean maker's distinct pocket stitching pattern serves as the primary source identifier for the goods. When viewed in its entirety, the weight of the evidence of record clearly shows that pocket stitching designs are used as source identifiers in the marketplace.

Because Applicant's mark is so unique, and because consumers are so highly conditioned to look to pocket stitching designs as source identifiers, the mark in the present application is inherently distinctive and should be allowed registration on the Principal Register.

### **III. Similar Third Party Trademark Marks are Treated as Inherently Distinctive**

Applicant's mark is at least as unique and distinctive as any other pocket stitching design mark appearing on the Principal Register. The Examining Attorney's attempt to differentiate the

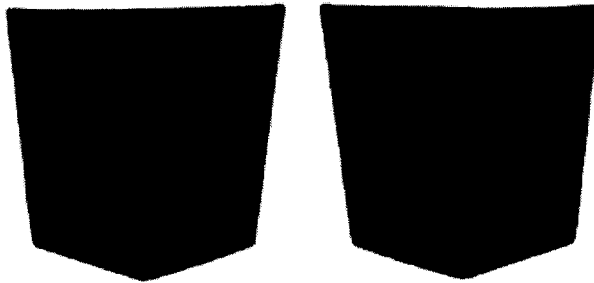
marks in such trademark registrations from the mark in the present application is arbitrary. The Examining Attorney states that the pocket stitching designs in Registrations Nos. 3114494, 3035822 and 3001859 are inherently distinctive because they represent words or letters. However, any such lettering that these marks represent is vague at best. The overall commercial impression of the marks in each of these registrations is merely that of a pocket stitching design, and not of any specific lettering.<sup>1</sup> Thus, the Examining Attorney's attempt to distinguish these marks, which appear on the Principal Register, from the mark in the present application is unfounded.

The Examining Attorney has completely ignored a number of other trademark registrations for pocket stitching designs that appear on the Principal Register without the benefit of an acquired distinctiveness claim. See Registrations Nos. 0404248, 577490, 1139254, and 2791156. Each of these registrations provides further strong evidence of the fact that pocket stitching designs such as that offered under the present application are inherently distinctive and should be allowed on the Principal Register. In addition, Applicant's own prior registrations provide evidence of this same point. See Registrations Nos. 3090433, 3104095, and 3106997. The marks featured in these trademark registrations are very similar to Applicant's present mark, and are as follows:

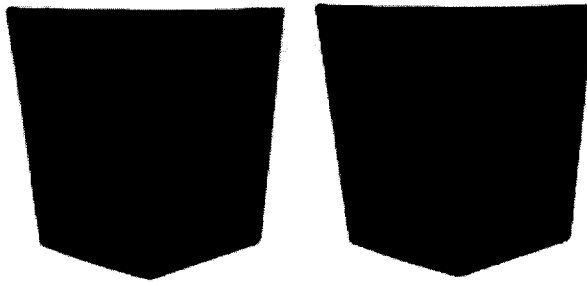
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<sup>1</sup> To the extent that these designs may suggest lettering, Applicant's mark does the same. Applicant's mark could equally be said to suggest mirrored "Y"s, or Greek gammas.

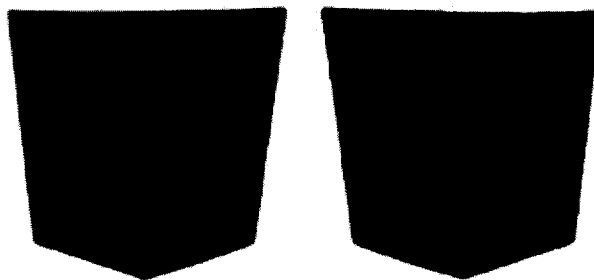
Registration No. 3090433:



Registration No. 3104095



Registration No. 3106997:



A review of the significant number of registrations currently appearing upon the Principal Register without a claim of acquired distinctiveness provides strong evidence that the U.S. Patent and Trademark Office correctly treats pocket stitching designs like the mark in the present application as inherently distinctive. As such, the mark in the present application is entitled to registration on the Principal Register.

As to the registrations cited by the Examining Attorney showing pocket stitching designs on the Supplemental Register, Applicant has shown that the weight of third party registrations of

record indicates that pocket stitching designs are more often than not considered distinctive.

Further, as to the third party registrations of record for pocket stitching designs that appear on the Supplemental Register, the record provides no indication of why these registrations were filed on the Supplemental Register. There is no evidentiary basis to conclude from the presence of these registrations on the Supplemental Register that this means the pocket stitching designs are ornamental. These marks could appear on the Supplemental Register for other reasons. Thus the fact of their presence on the Supplemental Register is inconclusive. It certainly does not "demonstrate that stitching patterns are generally viewed as non-distinctive."

#### **IV. Conclusion**

The shapes of Applicant's mark is both unique and arbitrary, and in light of market practices of record, it is clear that such pocket stitching designs are commonly used as source identifying trademarks. Applicant's mark is at least as unique as any other pocket stitching design mark currently registered on the Principal Register. Thus, Applicant's mark is inherently distinctive and the refusal should be reversed.

Respectfully submitted,

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**August 17, 2007**

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